AmIslamic Bank Bhd (previously known as AMBB Capital Bhd and as AmBank Bhd prior to that) v Naganthiren a/l Vijayakumaran

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12B-293 OF 2010
CHEW SOO HO JC
18 FEBRUARY 2011

Evidence — Expert evidence — Signature — Allegation of forgery — Comparison of sample signatures with questioned signature — Whether a matter of prudence — Whether trial judge erred in basing on his own comparison — Whether trial judge should have sought aid of expert in signature — Whether final decision is of the court and not the expert

Evidence — Witness — Demeanour of witness — Signature on hire purchase agreement — SP2 direct witness — Evidence full of contradiction and inconsistencies — Whether trial judge right in treating evidence of SP2 with grave suspicion — Whether circumstances warrant interference

Hire Purchase — Hire purchase agreement — Validity of — Signature Allegation of forgery — SP2 direct witness to signature — Evidence full of contradiction and inconsistencies — No personal interest in outcome of proceeding — Whether trial judge failed to give weight to evidence of SP2 as direct witness to the signature of respondent — Whether trial judge erred on forgery of respondent's signature — Whether appropriate to base on own comparison without aid of expert in signature — Whether trial judge erred in not invoking s 114(g) of the Evidence Act 1950 against respondent for failure to call 'Man Perabot' (broker) as stated in police report

The appellant herein appeals against the decision of the learned sessions judge ('SJ') for the breach of the terms and conditions of a hire purchase agreement (P6) dated 18 April 2003 purportedly entered into between the appellant and the respondent in respect of the purchase of a Proton Saga. The respondent however, denied that he had signed the said hire purchase agreement with the appellant and further, denied the signature therein to be his. The learned SJ after hearing the whole case, had rejected the evidence of the appellant's/plaintiff's second witness, SP2, who had allegedly witnessed the signature of the respondent on the said hire purchase agreement. This is because the SJ had doubted the credibility of SP2 who had been warned by the former to speak the truth but did not appear to have done so. When SP2's evidence was rejected by the trial court, the remaining evidence of the appellant

had failed to prove the plaintiff's case on a balance of probabilities and hence, the plaintiff's case was dismissed with costs. The appellant contended, inter alia, that the SJ had erred in his finding of facts on the forgery of respondent's signature basing on his own comparison without the aid of an expert in signature. Further, the trial court had failed to invoke s 114(g) of the Evidence Act 1950 ('Act') against the respondent for his failure to call 'Man Perabot' (broker) as stated in his police report D21. It was also contended that the SJ had given undue weight to documentary exhs D21, D23, D24, D27 and D28 which documents the SJ had used to compare with the signature on the hire purchase agreement. The appellant also contended that the learned SJ had failed to give weight to the evidence of SP2 as direct witness to the signature of the respondent in P6 as SP2 had no personal interest in the outcome of the proceedings.

Held, dismissing the appeal with costs:

(1) The learned SJ 's finding on the credibility of SP2 was based on the demeanour of SP2 whom the learned SJ had the audio-visual advantage of observing and forming the impression as to the honesty and accuracy of the evidence given by SP2. It is trite that it is undesirable for this court to disturb such finding where the conclusions reached by the learned SJ depends to a large extent on the credibility of the witness of which this court does not have the benefit and opportunity of observing and hearing (see para 7).

(2) The trial court had the power pursuant to s 73 of the Evidence Act 1950 to compare the signatures or handwriting upon other cogent material and perhaps admitted or proved facts and/or evidence to come to a finding. Even if there is an expert opinion, the decision of the matter is still vested in the court whether the signature is or is not that of the signatory and it is certainly not the expert who decides for the court. Looking at the disputed signature in the hire purchase agreement P6 and the sample signatures on the documentary exhibits, it was obvious that even with naked eyes, they appear acutely different which by itself gives rise to a doubt whether the disputed signature in P6 was signed by the respondent (see para 8).

(3) Adverse inference under s 114(g) can be drawn only if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. The evidence from Man, if called by the respondent would be to illicit facts that the respondent's said documents had been given and received by Man which facts had been endorsed by SP2 that SP2 had received such documents from Man. There was, to this court, no withholding or suppression of evidence (see para 10).

(4) All the exhibits, ie police reports, hire purchase agreements and certificates of guarantee from the bank, were documents of importance.

The signature on the important documents must necessarily be inferred to be properly authenticated with the actual signature of the signatory in the absence of any evidence to the contrary. The signatory, the respondent, had affirmed his signatures in these exhibits. It was therefore, proper for the learned SJ to rely on the exhibits to make comparison with the disputed signature on P6 pursuant to s 73 of the Act (see para 9).

(5) If the credibility of a witness who is supposed to be a direct witness was found to be untruthful or that his evidence is full of contradiction and inconsistencies, it is only just and right that such evidence ought to be treated with grave suspicion. Upon finding from other evidence in the whole case which indicates the impropriety or improbability of this direct evidence, the trial court should not hesitate to reject such evidence. This court did not find any error in law and in fact in the learned SJ 's decision in this aspect to warrant interference (see para 14–15).

[Bahasa Malaysia summary

Perayu di sini merayu terhadap keputusan hakim mahkamah sesyen ('HMS') bagi kemungkiran terma-terma dan syarat-syarat perjanjian sewa beli ('P6') bertarikh 18 April 2003 yang dimasuki di antara perayu dan pembeli berkaitan pembelian sebuah Proton Saga. Responden walau bagaimanapun, menafikan bahawa dia menandatangani perjanjian sewa beli tersebut dengan perayu dan selanjutnya, menafikan tandatangan yang terdapat di dalamnya kepunyaannya. HMS selepas mendengar keseluruhan kes, menolak keterangan saksi kedua perayu/plaintif, SP2, yang didakwa menyaksikan tandatangan responden pada perjanjian sewa beli tersebut. Ini kerana HMS meragui kebolehpercayaan SP2 yang diberi amaran oleh SJ untuk bercakap benar tetapi tidak kelihatan seperti bercakap benar. Apabila keterangan SP2 ditolak oleh mahkamah bicara, baki keterangan perayu gagal membuktikan kes plaintif atas imbangan kebarangkalian dan maka, kes plaintif ditolak dengan kos. Perayu menghujah, antara lain, bahawa HMS terkhilaf dalam penemuannya atas penipuan tandatangan responden berdasarkan perbandingannya sendiri tanpa bantuan pakar tandatangan. Selanjutnya, mahkamah bicara gagal membangkitkan s 114(g) Akta Keterangan 1950 ('Akta') terhadap responden bagi kegagalannya memanggil 'Man Perabot' (broker) seperti yang terdapat di dalam laporan polisnya D21. Ia juga menghujah bahawa HMS telah memberikan pertimbangan yang tidak sewajarnya bagi ekshibit dokumentar D21, D23, D24, D27 dan D28 iaitu dokemen-dokumen yang HMS telah gunakan untuk membandingkan dengan tandatangan pada perjanjian sewa beli tersebut. Perayu juga menghujah bahawa HMS yang bijaksana gagal memberikan pertimbangan kepada keterangan SP2 sebagai saksi langsung kepada tandatangan responden dalam P6 kerana SP2 tidak mempunyai kepentingan peribadi dalam keputusan prosiding.

Diputuskan, menolak rayuan dengan kos:

(1) Dapatan HMS yang bijaksana atas kebolehpercayaan SP2 adalah

berdasarkan kepada tingkah laku SP2 yang HMS yang bijaksana mempunyai kelebihan pandang dengar untuk melihat dan membentuk pendapat mengenai kejujuran dan ketepatan keterangan yang diberikan oleh SP2. Adalah matan bahawa mahkamah ini tidak boleh campur tangan dengan dapatan sedemikian di mana keputusan dicapai oleh HMS yang bijaksana bergantung secara luas kepada kebolehpercayaan saksi yang mana mahkamah ini tidak ada peluang dan kelebihan untuk melihat dan mendengar (lihat perenggan 7).

(2) Mahkamah bicara mempunyai kuasa berikutan s 73 Akta Keterangan 1950 untuk membandingkan tandatangan atau tulisan tangan dengan material lain yang meyakinkan dan mungkin fakta-fakta dan/atau keterangan yang diterima atau dibuktikan untuk mencapai keputusan. Walaupun terdapat pendapat pakar, keputusan perkara tersebut masih pada mahkamah sama ada tandatangan tersebut adalah atau bukan kepunyaan penandatangan tersebut dan ia sememangnya bukan pakar yang menentukan untuk mahkamah. Melihat kepada tandatangan yang dipertikaikan di dalam perjanjian sewa beli P6 dan contoh tandatangan dalam ekshibit dokumentar, adalah jelas walaupun dengan mata kasar, ia amat berbeza jelas yang dengan sendirinya membangkitkan keraguan sama ada tandatangan yang dipertikaikan dalam P6 ditandatangani oleh responden (lihat perenggan 8).

(3) Inferens bertentangan di bawah s 114(g) boleh dibuat hanya jika terdapat penahanan atau penyembunyian keterangan dan bukan semata-mata atas kegagalan mendapatkan keterangan. Keterangan daripada Man, jika dipanggil oleh responden adalah untuk fakta dilarang bahawa dokumen responden telah diberikan dan diterima oleh Man, suatu fakta yang dipersetujui oleh SP2 dan SP2 telah menerima dokumen tersebut daripada Man. Bagi mahkamah ini, tidak ada penahanan atau penyembunyian keterangan (lihat perenggan 10).

(4) Kesemua ekshibit, iaitu laporan polis, perjanjian sewa beli dan sijil jaminan daripada bank, adalah dokumen-dokumen penting. Tandatangan pada dokumen-dokumen penting tersebut semestinya dianggap disahkan dengan tandatangan asal penandatangan dalam ketiadaan keterangan sebaliknya. Pendatangan, responden, telah mengesahkan daripada tandatangannya di dalam ekshibit-ekshibit ini. Oleh demikian adalah wajar bagi HMS yang bijaksana untuk bergantung pada ekshibit-ekshibit tersebut untuk membuat perbandingan dengan tandatangan yang dipertikaikan pada P6 menurut s 73 Akta (lihat perenggan 9).

(5) Jika kebolehpercayaan seseorang saksi yang sepatutnya menjadi saksi langsung didapati tidak bercakap benar atau keterangannya penuh dengan percanggahan dan ketidakkonsistenan, ia adalah adil dan benar bahawa keterangan sedemikian dilihat dengan syak wasangka. Jika

didapati daripada keterangan lain di dalam keseluruhan kes yang menunjukkan kejanggalan atau ketidakmungkinan keterangan langsung ini, mahkamah perbicaraan tidak patut teragak-agak untuk menolak keterangan sedemikian. Mahkamah ini tidak mendapati apa-apa kesilapan dari segi undang-undang dan fakta dalam keputusan HMS yang bijaksana dalam aspek ini yang mewajarkan campur tangan (lihat perenggan 14–15).]

Notes

For a case on signature, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) para 1776.

For a case on validity of hire purchase agreement, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 4553.

For cases on conflicting evidence, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3007–3010.

Cases referred to

Ch'ng Kheng Phong v Chung Keng Huat & Ors [2011] 8 MLJ 32; [2010] 6 AMR 485, HC (refd)

Chan Yoke Lain v Pacific & Orient Insurance Co Sdn Bhd [1997] 4 CLJ Supp 8, HC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163 (folld)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61, FC (folld)

Malayan United Finance Bhd v Wan Muda Wan Ismail & Ors [1992] 3 CLJ (Rep) 26, HC (folld)

PP v Abdul Rahim bin Abdul Satar [1990] 3 MLJ 188; [1990] 3 CLJ (Rep) 1, HC (refd)

Public Finance Bhd v Harta Pertama Sdn Bhd & Ors [2002] 4 MLJ 599, CA (refd)

R v Silverlock [1894] 2 QB 766, CCR (refd)

RHB Bank Bhd v Dominance Timber Industries Sdn Bhd & Ors and another case [2009] 7 CLJ 654, HC (folld)

Ryan v Jarvis [2005] UKPC 27, PC (refd)

Siaw Kim Seong v Siew Swee Yen & Anor [2009] 1 MLJ 349, CA (folld)

Siti Aisha binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124, FC (refd)

Legislation referred to

Evidence Act 1950 ss 47, 73, 114(g)

Guan Tong Lee (KK Lim & Associates) for the appellant.
Joshua Narendran (Ajmer, Sandhu & Ong) for the respondent.

Chew Soo Ho JC:

BACKGROUND FACTS

[1] This appeal is against the decision of the learned sessions judge made on the 13 April 2010 after a full trial wherein the appellant's claim for the sum of RM32,837.84 for the breach of the terms and conditions of a hire purchase agreement dated 18 April 2003 purportedly entered into between the appellant and the respondent in respect of the purchase of a Proton Saga car WDW 3627 allegedly by the respondent, was dismissed with costs.

[2] The main contention and defence of the respondent is that he had not signed the said hire purchase agreement with the appellant and denied the signature therein to be his. The learned sessions judge after hearing the whole case, has rejected the evidence of the appellant's/plaintiff's second witness SP2 who had allegedly witnessed the signature of the respondent on the said hire purchase agreement. This is because the learned trial judge had doubted the credibility of SP2 who had been warned by the former to speak the truth but did not appear to have done so. When SP2's evidence was rejected by the trial court, the remaining evidence of the appellant had failed to prove the plaintiff's case on a balance of probabilities and hence the plaintiff's case was dismissed with costs.

GROUNDS OF APPEAL

[3] The appellant has raised seven grounds of appeal as follows:

(1) Tuan Hakim telah terkhilaf di sisi fakta dan undang-undang apabila membuat penemuan fakta tentang pemalsuan tandatangan Responden hanya berdasarkan perbandingan tandatangan tanpa memanggil keterangan Pakar Tandatangan.

(2) Tuan Hakim telah terkhilaf di sisi fakta dan undang-undang apabila gagal dan/atau enggan menggunakan Seksyen 114(g) Akta Keterangan 1950 terhadap Responden kerana kegagalan memanggil 'Man Perabot' (broker) yang diperkenalkan di dalam Laporan Polis Responden (Ekshibit D - 21).

(3) Tuan Hakim telah terkhilaf di sisi fakta apabila tidak mengambil kira pengakuan Responden bahawa Responden tidak menghilangkan kad pengenalan tulen (Original Identity Card) pada tahun 2003 dan juga keterangan Saksi Kedua Perayu yang mengatakan bahawa Responden telah mengemukakan kad pengenalan tulen sebelum menandatangani Perjanjian Sewa Beli tersebut.

(4) Tuan Hakim telah terkhilaf di sisi fakta dan undang-undang apabila membuat perbandingan tandatangan Responden dengan merujuk kepada Ekshibit D21, D23, D 24, D27, D28 yang bukan tandatangan kontemporari dengan Perjanjian Sewa Beli bertarikh 18/04/2003.

(5) Tuan Hakim telah terkhilaf di sisi fakta dan undang-undang apabila merujuk dan menggunakan Ekshibit D21, D23, D24, D27 dan D28 untuk perbandingan tandatangan tanpa keperluan Responden memanggil saksi untuk membuktikan ketulenan dan kandungan dokumen-dokumen tersebut yang dimasukkan ke dalam Ikatan Dokumen Tidak Diperetujui (Bahagian III).

(6) Tuan Hakim telah terkhilaf di sisi fakta dan undang-undang apabila memberikan keberatan yang tidak wajar kepada Ekshibit D21, D23, D24, D27 dan D28.

(7) Tuan Hakim telah terkhilaf di sisi fakta-fakta apabila gagal memberikan keberatan yang sewajarnya dan/atau gagal mengambil kira keterangan Saksi Kedua Perayu yang merupakan 'direct witness' kepada tandatangan Responden di atas Perjanjian Sewa Beli tersebut dan tidak mempunyai apa-apa kepentingan peribadi di dalam keputusan prosiding.

[4] I shall deal with these grounds according.

EVALUATION AND FINDINGS

The first ground

Learned sessions judge had erred in his finding of facts on the forgery of respondent's signature basing on his own comparison without the aid of an expert in signature

[5] The hire purchase agreement (P6) as contained in pp 474–478 of the appeal record is the whole basis of the appellant's claim in this case. SP2 giving evidence for the appellant/plaintiff testified that he had witnessed the respondent/defendant signing on P6 on 18 April 2003. There are two signatures of the hirer, one on the first page and the other at the last page of this agreement. The defendant had called the human resource officer of his employer (SD2) who testified that the defendant was working in the company from 8am–8pm for 12 hours on 18 April 2003. In addition, the defendant also produced documents D21, his police report made on 7 March 2005 (p 517 of the appeal record), D23, a hire purchase agreement dated 19 June 2002 between Public Finance Bhd and the defendant (pp 520–527 of the appeal record), D24, a hire purchase agreement between Chong Chin Motorshop and the defendant dated 13 March 2003 (pp 528–531 of the appeal record), D27 ('surat akuan gadaian' between Bank Rakyat and the respondent with 10 March 2008 as the date of the charge (p 535 of the appeal record), and D28, his police report dated 9 July 2004 (pp 536–537 of the appeal record) to show that his actual signature is different from the disputed signature on P6.

[6] After hearing and seeing SP2 giving his evidence, the learned sessions judge found as he had expressed in his ground of judgment pp 14–15 of the appeal record as follows:

> 7. Keterangan yang diberikan oleh SP2, tuan punya Ford Agency tempat di mana dikatakan Defendan memilih untuk membeli kereta Proton Saga WDW 3627 dan menandatangani perjanjian sewa beli tersebut, menimbulkan banyak percanggahan dan meragukan Mahkamah. Seterusnya Mahkamah menolak keseluruhan keterangan SP2. SP2 pada mula mendakwa dia mendapatkan kad pengenalan, slip gaji dan kad pengenalan Defendan dari Defendan selepas dia tandatangan invois tetapi kemudian semasa disoal balas SP2 mendakwa semua dokumen tersebut telah diperolehi dari seorang broker bernama Man Perabot sehari sebelum perjanjian sewa beli tersebut ditandatangani.
>
> 8. Semasa SP2 memberi keterangan Mahkamah telah memberi amaran kepada SP2 supaya bercakap benar. Ini adalah kerana didapati SP2 bertukar-tukar jawapan yang diberikan. Dia juga teragak-agak di dalam memberikan jawapan dan lebih suka menjawab tidak ingat kepada soalan-soalan yang penting semasa soal balas.

[7] The learned sessions judge's finding on the credibility of SP2 is based on the demeanour of SP2 whom the learned sessions judge has the audio-visual advantage of observing and forming the impression as to the honesty and accuracy of the evidence given by SP2. It is trite that it is undesirable for this court to disturb such finding where the conclusions reached by the learned sessions judge depends to a large extent on the credibility of the witness of which this court does not have the benefit and opportunity of observing and hearing. In *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 at p 126, the Federal Court pronounced as follows:

> The principle that should guide an appellate court in this regard is to be found in the Privy Council case of *Yahaya bin Mohamad v Chin Thun Nam* [1975] 2 MLJ 117 … The Privy Council held that the finding of a presiding judge should not have been disturbed. It is only in a rare case that 'an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial judge on the question of credibility. We are of the same view that an appellate court may be justified in coming to a different conclusion if there is a valid reason to think that the trial judge had not taken proper advantage of having seen and heard the witnesses'.

[8] See also *China Airlines Ltd v Maltran Air Corp Sdn Bhd (Formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 (FC) as submitted by the respondent. Having perused the witness statement of SP2 (WSP2 at pp 502–508 of the record of appeal), his cross-examination and re-examination (pp 29–39 of the appeal record), I do not think that there is a valid reason for me to find that the trial judge had not taken proper advantage of having seen and heard SP2 when he concluded that

he doubted SP2's credibility and ultimately decided to reject SP2's evidence. It must be noted that the rejection of SP2's evidence was not made at the instance of or at the end of SP2's testimony itself but at the end of the whole trial. At the end of the trial, the learned sessions judge had drawn an adverse inference against the appellant for not producing the receipt for the deposit payment allegedly issued by SP2 and the registration card of the car WDW 3627 showing that the respondent had been registered as the hirer under s 114(g) of the Evidence Act 1950. He had also considered the fact adduced by defence's second witness (SD2) that the respondent was working from 8am–8pm on 18 April 2003, the date the respondent was alleged to have signed the hire purchase agreement before SP2 and the evidence of SD3, the respondent's immediate neighbour, who had never seen the respondent driving or in possession of the said car. Learned sessions judge had also exercised his discretion to compare the disputed signature on P6 with the respondent's exhs D21, D23, D24 and D27 pursuant to ss 47 and 73 of the Evidence Act 1950. The authorities in this respect of comparison of writings including signatures under s 73 of the Evidence Act 1950 as submitted by learned counsel for the respondent ie *Malayan United Finance Bhd v Wan Muda Wan Ismail & Ors* [1992] 3 CLJ (Rep) 26; *RHB Bank Bhd v Dominance Timber Industries Sdn Bhd & Ors And Another Case* [2009] 7 CLJ 654; *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; *Siaw Kim Seong v Siew Swee Yen & Anor* [2009] 1 MLJ 349 are relevant law which are applicable herein. I do not wish to repeat herein save to say that the trial court has the power pursuant to s 73 of the Evidence Act 1950 to compare the signatures or handwriting upon other cogent material and perhaps admitted or proved facts and/or evidence to come to a finding. Even if there is an expert opinion, the decision of the matter is still vested in the court whether the signature is or is not that of the signatory and it is certainly not the expert who decides for the court. Taking all these evidence into account, and on the credibility of SP2 whom the learned sessions judge had doubted, it appears to this court that he had good and valid reason to reject SP2's evidence upon finding of fact. I do not find any grave error in the learned sessions judge's finding in this respect to justify any interference. Looking at the disputed signature in the hire purchase agreement P6 and the sample signatures on the documentary exhibits, I must say even with naked eyes, they appear acutely different which by itself gives rise to a doubt whether the disputed signature in P6 was signed by the respondent.

The second ground

The trial court has failed to invoke s 114(g) of the Evidence Act 1950 against the respondent for his failure to call 'Man Perabot' (broker) as stated in his police report D21

[9] The version of event of the respondent leading to his police report D21

is that Man had taken his documents and had not returned them. The respondent submitted that defence's version is consistent with this police report that the said documents of the respondent were handed to Man for the purpose of buying a car. It is also consistent with SP2's evidence that a person by the name Man had given the respondent's documents such as identity card, driving licence and pay slips to him. The appellant submitted that the allegation in the police report pertains to identity theft and the respondent had been dealing with this Man for the purchase of the said car and if the respondent's signature had been forged and his identity stolen, there is no reason for the respondent to cover up this material witness who would be able to give evidence in the suit. The appellant submitted that s 114(g) of the Evidence Act 1950 ought to have been invoked against the respondent.

[10] Having considered both submissions and the evidence of the case, I find that the undisputed evidence is that the respondent had given his personal documents ie his identity card, driving licence and pay slips to the said 'Man Perabot' who acted as broker or runner for the sale and purchase of vehicles and these documents had been received by SP2. When the respondent had given those documents to Man, the respondent, at that material time, had intended to buy the vehicle but two days later, he declined to take up the car; the documents were however not returned when he asked for the return. It was not until 4 March 2005 when he received a call from Bank Bumiputra Commerce, Juru that he had defaulted 22 months of installments and that his name had been black listed that he realised and suspected his personal documents had been misused (see D21 at p 517 appeal record). It must be borne in mind that adverse inference under s 114(g) can be drawn only if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence; see *Sarkar's Law of Evidence* (15th Ed), 1999 at p 1678. The evidence from Man, if called by the respondent would be to illicit facts that the respondent's said documents had been given and received by Man which facts had been endorsed by SP2 that SP2 had received such documents from Man. There is, to this court, no withholding or suppression of evidence. The respondent could only suspect that his personal particulars had been misused but who is the culprit will be left to the police to investigate and that is I think beyond the ability of the respondent. In that sense I do not agree with the appellant's submission that the respondent was attempting to cover up Man when the respondent did not call the latter as witness. In any event, as per the respondent's police report D21, he had reported that Man could no longer be contacted. Similarly, SP2's evidence confirming receipt of the respondent's personal particulars from Man in line with the respondent's evidence does not constitute suppression of any such evidence and s 114(g) of the Evidence Act 1950 cannot be invoked against the appellant for non-calling of Man Perabot. I find this ground unsustainable.

The third ground

Learned sessions judge had failed to consider the admission of the respondent that he had not lost his original identity card and the evidence of SP2 who stated that respondent had produced the genuine identity card before signing the hire purchase agreement

[11] I do not see any relevance in this ground since the fact remains that the respondent had given his identity card and the other documents to the said Man Perabot and these documents had subsequently landed in the hand of SP2. The respondent's particulars in P6 are undoubted whether SP2 had been handed the original identity card of the respondent before signing the hire purchase agreement P6 which is a question of fact for the trial judge to come to a finding. Since the learned sessions judge had doubted the credibility of SP2 from all evidence in this case, this ground would have no merit.

The fourth, fifth and sixth grounds

These grounds referred to the documentary exhs D21, D23, D24, D27 and D28, the signatures of which had not been proved but the trial judge had used them to compare with the signature on the hire purchase agreement and the learned trial judge had given undue weight to these exhibits

[12] Exhibits D21, D23, D24, D27 and D28 contained signatures of the respondent which are, as contended by the appellant, not contemporary to the signature on the hire purchase agreement dated 18 April 2003 with which the learned sessions judge had used to make comparison. This whole issue for which the above three grounds relate, as submitted by the respondent, was not canvassed in submission before the trial judge and should have been regarded as having been abandoned. The respondent is objecting to such issue being raised as a ground herein. I must say I agree. In *Public Finance Bhd v Harta Pertama Sdn Bhd & Ors* [2002] 4 MLJ 599, the Court of Appeal expressed the view in this respect as follows:

> … it was thus inappropriate for the Court of Appeal to express any views on the matter. This is particularly so when the point was not put to the trial judge at the conclusion of the case in the manner it was put before the Court of Appeal. Any attempt by the Court of Appeal to intervene in this appellate stage would constitute a breach of the rules of natural justice especially when the trial judge had not been given an opportunity to express his views on the matter.

[13] In any event, from the respective dates on the exhibits in which bore the

signatures of the respondent, exhs D21 and D28 are about one year after 18 April 2003 the date of the hire purchase agreements, P6; exh D23 is about one year before P6; exh D24 is about one month before P6 while D27 is about five years after P6. I have expressed my view that contemporariness would be reasonably within a period of time of six months extending to one year for the purpose of comparison of sample signatures with the questioned signature; see *Ch'ng Kheng Phong v Chung Keng Huat & 2 Ors* [2011] 8 MLJ 32; [2010] 6 AMR 485. A lapse of five years would certainly be too long a time to constitute contemporariness. Nevertheless, disregarding exh D27 which is about five years after P6, the other exhibits, to this court, suffice as sample for the learned sessions judge to make the comparison under s 73 of the Evidence Act 1950. However, looking at s 73 itself, it does not provide that the comparison must be with contemporary samples but with signatures admitted or proved to the satisfaction of the court to have been written by that person. Contemporariness of the sample is perhaps as a matter of prudence. Although exhs D21, D23, D24, D27 and D28 are contained in Part C of the bundle of documents, it is a fact that the respondent was the party named in these documents and he had affirmed that he signed these exhibits. The respondent being the affirming person for whose purpose or on whose behalf the averments contained in the documents are made, is indeed the actual maker of the document. The maker is the person who authenticates the documents; the mere deed of composing, framing, ascribing, or preparing a document or reducing certain details into writing, does not ipso facto turn the writer into the maker of a document within the contemplation of the hearsay rule; see *Public Prosecutor v Abdul Rahim bin Abdul Satar* [1990] 3 CLJ (Rep) 1. In addition what is pertinent is only the signature of the respondent in these documents and not the other contents therein. The respondent being himself the signatory can certainly be able to affirm that the signature therein belonged to him unless there is evidence to show otherwise. There is no evidence from the appellant to show to the contrary. Thus, it must be concluded that these sample signatures as contained in these exhibits must be construed to have been admitted or proved to have been written by the respondent. One other pertinent fact to note is that all these exhibits are documents of importance ie police reports, hire purchase agreements and certificate of guarantee from the bank. The signature on these important documents must necessarily be inferred to be properly authenticated with the actual signature of the signatory in the absence of any evidence to the contrary. The signatory, the respondent, had affirmed his signatures in these exhibits. I find it proper for the learned sessions judge to rely on these exhibits to make comparison with the disputed signature on P6 pursuant to s 73 of the Evidence Act 1950.

A B C D E F G H I

The seventh ground

The failure of the learned sessions judge to give weight to the evidence of SP2 as direct witness to the signature of the respondent in P6 as SP2 has no personal interest in the outcome of the proceeding

[14] Since the learned sessions judge had doubted the credibility of SP2, it is difficult to perceive how he could give weight to the evidence of SP2 which are full of inconsistencies, uncertainties and evasiveness; examples of the numerous contradictions are as listed out at para 4.73 at pp 18–20 of the respondent's submission. This is a case where the learned sessions judge had taken note of the inconsistencies and variations of evidence from time to time given by SP2 that the learned sessions judge felt compelled to warn SP2 to speak the truth but SP2 remained uncertain in giving his answers and elected to answer that he did not remember to important questions asked in cross-examination. I must agree with His Lordship James Foong J (now FCJ) when he said in *Chan Yoke Lain v Pacific & Orient Insurance Co Sdn Bhd* [1997] 4 CLJ Supp 8 that 'cross-examination into the nitty gritty of what this witness saw at the material time is not only relevant, but essential in this situation to determine whether such direct evidence is true or fabricated'. Each case will depend on its own fact. If the credibility of a witness who is supposed to be a direct witness is found to be untruthful or that his evidence is full of contradiction and inconsistencies, it is only just and right that such evidence ought to be treated with grave suspicion and upon finding from other evidence in the whole case which indicates the impropriety or improbability of this direct evidence, the trial court should not hesitate to reject such evidence. To reiterate on the issue of the trial judge's findings on credibility, Lord Hoffman stated what the appellate practice should be in *Ryan v Jarvis* [2005] UKPC 27 as follows:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witness than to the appellate court reading the record.

[15] I do not find any error in law and in fact in the learned sessions judge's decision in this aspect to warrant my interference.

The eigth and nineth grounds

The decision of the learned sessions judge is against the law, the just principles and the weight of evidence

[16] Upon the findings as above, these two grounds would have no merit.

OTHER FACTORS ETC

[17] The respondent has in submission raised other factors which support the defence's contention of not having signed the said hire purchase agreement P6. These appear at para 5.2 of the respondent's written submission. Save for the issue of s 114(g) of the Evidence Act 1950,I must say that I agree with the submission which I find no necessity to repeat. In respect of the evidence of respective witnesses raised by both parties, the learned sessions judge had made the necessary and relevant findings. It is not for this court to go into their respective credibility which is a matter for the trial court. What I wish to reiterate is the evidence of SD2, the human resource officer of the defendant's employer who testified as to the signature of the respondent on the documents which were marked as ID. I am inclined to agree with learned counsel for the respondent that s 47 of the Evidence Act 1950 aptly applies in such situation where although SD2 did not see the respondent affixed his signature personally, she had been in the ordinary course of business, receiving documents purporting to be written or signed by the respondent being habitually submitted to her; see explanation to s 47 of the Evidence Act and the third illustration therein. Under s 47 of the Evidence Act, a person who is non-expert may give evidence as to his acquaintance with the handwriting or signature of the person in question; see *RHB Bank Bhd v Dominance Timber Industries Sdn Bhd & Ors*; *R v Silverlock* [1894] 2 QB 766.

CONCLUSION

[18] For the foregoing reasons, this appeal is dismissed with costs of RM3,000.

Appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed